A **DATO' SERI ANWAR IBRAHIM**

v.

PP

B FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
ZALEHA ZAHARI FCJ
JEFFREY TAN FCJ
ABU SAMAH NORDIN FCJ
C RAMLY ALI FCJ
[CRIMINAL APPLICATION NO: 07-2-03-2013(W)]
26 MARCH 2014

D ***CRIMINAL PROCEDURE:*** *Judgment - Written judgment - Application to expunge part of paragraph in judgment - Expunction of irrelevant remarks made against person - Tests propounded in State of Uttar Pradesh v Mohd Naim - Whether satisfied - Whether there was sufficient evidence to justify remarks made by judge - Whether comments part of analytical process undertaken by judge in arriving at decision -*
E *Whether remarks a "personal opinion" of judge - Whether applicant had opportunity to challenge accusations made against him - Whether there was evidence on record bearing on conduct justifying remarks - Whether necessary for decision of case to animadvert on conduct - Inherent powers of court - Whether fit and proper case for court to exercise inherent*
F *jurisdiction - Rules of the Federal Court 1995, r. 137*

CRIMINAL PROCEDURE: *Judgment - Written judgment - Application to expunge part of paragraph in judgment - Inherent powers of the court - Whether extended to expunction or ordering expunction of*
G *irrelevant remarks made against a person - Rules of the Federal Court 1995, r. 137*

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Federal Court - Application to expunge part of paragraph in judgment - Inherent powers of the court - Whether extended to expunction or ordering expunction of*
H *irrelevant remarks made against a person - Whether fit and proper case for court to exercise its inherent jurisdiction - Rules of the Federal Court 1995, r. 137*

CRIMINAL PROCEDURE: *Appeal - Appeal to Federal Court -*
I *Application to expunge part of paragraph in judgment - Inherent powers of the court - Whether extended to expunction or ordering expunction of irrelevant remarks made against person - Whether fit and proper case for court to exercise its inherent jurisdiction - Rules of the Federal Court 1995, r. 137*

This was the applicant's application under r. 137 of the Rules of the Federal Court 1995 ('RFC') for this court to exercise its inherent powers to expunge part of one paragraph of the judgment of His Lordship Abdul Hamid Mohamad in Federal Court Criminal Appeal No 05-6-2003(W) and No 05-7-2003(W). The impugned part of the paragraph sought to be expunged was in the majority decision of the Federal Court in allowing the applicant's appeal against his conviction and sentence for an offence of committing carnal intercourse against the order of nature, an offence under s. 377A punishable under s. 377B of the Penal Code. The applicant contended that the impugned part of the paragraph had grossly tarnished his reputation and continuously caused serious injustice and damaged his reputation as it had been constantly misused and abused, repeated and widely published as a justification to condemn him as a homosexual or sexual deviant to the public. The applicant was of the view that part of the majority judgment was the personal remark of the learned judge which was not the basis, *ratio decidendi* nor the *obiter dictum* of the majority judgment. According to the applicant, there was no evidential basis that justified the making of that remark. The applicant thus submitted that this court had the inherent powers to make any order for the purpose of securing the ends of justice and that these powers extended to expunction or ordering expunction of irrelevant remarks made against a person whether or not they were parties to the proceedings. Both the applicant and the Deputy Public Prosecutor relied on three considerations or tests propounded in the case of *State of Uttar Pradesh v. Mohd Naim*: (i) whether the party whose conduct was the subject of remark was before the court and had the opportunity of explaining or defending himself; (ii) whether there was evidence on record bearing on that conduct justifying the remarks; and (iii) whether it was necessary for the decision of the case, as an integral part thereof, to animadvert on conduct.

Held (dismissing application)
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) This court's discretionary powers under r. 137 of the RFC should not be exercised liberally but sparingly, in very exceptional cases where a significant injustice had probably occurred. Herein, the applicant was a party to the proceedings as an appellant. There was sufficient evidence on

A record to justify the comment which the learned judge did. The comment was part and parcel of the analytical process undertaken by the learned judge in arriving at the decision which the majority judgment did. Thus, this was not a proper case for this court to exercise its inherent powers under r. 137
B RFC to make an order for the impugned part of the paragraph to be expunged. (paras 9, 10 & 13)

(2) The impugned paragraph commenced with the words "... even though reading the appeal record ..." and were followed by
C these critical words, "we find evidence ...". The conclusion arrived at by the majority judgment in the impugned paragraph was in fact based on evidence found in the appeal record. It therefore could not be termed a "personal opinion" of the learned judge who delivered the majority decision. (para 14)

D **(3)** The applicant had every opportunity of challenging the accusations made against him, both by cross examining the prosecution witnesses and by adducing evidence on his own behalf as well as through his own witnesses. The learned judge in the majority judgment dealt with the evidence, the
E submissions and every ruling of the trial judge was scrutinised, including the applicant's defence or explanation. Thus, the first test under *Mohd Naim* had been satisfied in the circumstances of this case. (para 15)

F **(4)** The majority view was of the opinion that the "date" formed an essential ingredient of the charge that had to be proved by the prosecution. At no time did the majority judgment hold that the sexual offence did not occur. The majority judgment accepted that the sexual incident forming the crux of the
G charge did in fact occur but were doubtful as to when it in fact took place. There was more than sufficient evidence on record for the learned judge to make the observation which he did in the impugned part of the paragraph. Thus, the second test under *Mohd Naim* was also satisfied. (paras 17 & 18)

H **(5)** To prove the charge of committing carnal intercourse against the order of nature under s. 377A of the Penal Code, the prosecution had to establish (i) the accused had carnal intercourse with a person; (ii) that such intercourse was
I against the order of nature; (iii) the accused did the act

voluntarily; and (iv) that there was penetration. The majority judgment of the Federal Court held that in addition to the above ingredients, there included the ingredient of "date." Should one of the ingredients of the charge remained unproved, then the charge was not made out. The learned judge in the majority judgment was referring to an ingredient of the charge. There was nothing wrong with that finding. Submissions were made on that ingredient by both parties to the appeal and that surely entitled the learned judge in delivering the majority decision to comment on that ingredient. The third test under *Mohd Naim* was therefore satisfied. (paras 19, 20 & 21)

(6) The learned judge in delivering the majority decision was perfectly entitled to make the remark as in the impugned part of the paragraph in accordance with the tests propounded in *Mohd Naim*. Further, should this application be allowed, it may open a floodgate for dissatisfied parties to make similar applications to "edit" judgments of the courts to suit their respective purposes. This would tantamount to interfering with the judicial process which should not be allowed. (para 22)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah permohonan pemohon di bawah k. 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KMP') untuk mahkamah ini melaksanakan kuasa sedia ada untuk memotong sebahagian daripada satu perenggan penghakiman Yang Arif Abdul Hamid Mohamad dalam Rayuan Jenayah Mahkamah Persekutuan No 05-6-2003 (W) dan No 05-7-2003 (W). Perenggan yang dipersoalkan yang dipohon untuk dipotong terkandung dalam keputusan majoriti Mahkamah Persekutuan yang membenarkan rayuan pemohon terhadap sabitan dan hukuman bagi kesalahan melakukan persetubuhan bertentangan dengan aturan tabii, satu kesalahan di bawah s. 377A yang boleh dihukum di bawah s. 377B Kanun Keseksaan. Pemohon menghujahkan bahawa perenggan yang dipersoalkan telah mencemarkan reputasinya dan telah secara berterusan menyebabkan ketidakadilan yang serius dan telah merosakkan nama baiknya kerana ia telah sentiasa disalahgunakan, diulangi dan telah disebarkan secara meluas sebagai justifikasi untuk mencelanya sebagai individu yang suka kepada seks hubungan sejenis atau mengamalkan hubungan seks luarbiasa

kepada pihak awam. Pemohon berpendapat bahawa sebahagian penghakiman majoriti adalah kenyataan peribadi yang arif hakim yang bukan asas, *ratio decidendi* atau *obiter dictum* penghakiman majoriti. Menurut pemohon, tiada asas jelas yang menjustifikasikan pembuatan kenyataan itu. Pemohon, oleh itu, menghujahkan bahawa mahkamah ini mempunyai kuasa sedia ada untuk membuat apa-apa perintah bagi tujuan mendapatkan matlamat keadilan dan bahawa kuasa ini diperluaskan kepada pembatalan atau perintah pembatalan kenyataan-kenyataan yang tidak relevan yang dibuat terhadap seseorang sama ada mereka adalah pihak kepada prosiding atau tidak. Kedua-dua pemohon dan Timbalan Pendakwa Raya bergantung kepada tiga pertimbangan atau ujian yang dikemukakan dalam kes *State of Uttar Pradesh v. Mohd Naim*: (i) sama ada pihak yang kelakuannya adalah subjek kenyataan berada di hadapan mahkamah dan mempunyai peluang untuk menjelaskan atau mempertahankan dirinya; (ii) sama ada terdapat keterangan atas rekod yang mempengaruhi tindakan yang menjustifikasikan kenyataan yang telah dibuat; dan (iii) sama ada perlu bagi keputusan kes ini, sebagai satu bahagian penting daripadanya, untuk mengkritik kelakuan.

Diputuskan (menolak permohonan)

Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Kuasa budi bicara mahkamah di bawah k. 137 KMP tidak sepatutnya dilaksanakan secara liberal tetapi dengan berhati-hati, dalam kes-kes yang sangat luar biasa di mana satu ketidakadilan penting telah mungkin berlaku. Di sini, pemohon menjadi pihak kepada prosiding sebagai perayu. Terdapat keterangan memadai atas rekod untuk menjustifikasikan kenyataan yang dibuat yang arif hakim. Kenyataan tersebut adalah sebahagian daripada proses analisis yang dilaksanakan oleh yang arif hakim dalam mencapai keputusan yang dibuat oleh penghakiman majoriti. Oleh itu, ini bukanlah kes yang sesuai untuk mahkamah ini melaksanakan kuasa sedia ada di bawah k. 137 KMP untuk membuat perintah supaya bahagian yang dipersoalkan itu dipotong.

(2) Perenggan yang dipersoalkan dimulakan dengan perkataan "... walaupun membaca rekod rayuan ..." dan diikuti dengan perkataan kritikal, "kami mendapati keterangan ..." Kesimpulan yang dibuat oleh penghakiman majoriti dalam perenggan yang

dipersoalkan adalah berdasarkan keterangan yang didapati dalam rekod rayuan. Oleh itu ia tidak boleh diistilahkan sebagai satu "pendapat peribadi" yang arif hakim yang telah menyampaikan keputusan majoriti.

(3) Pemohon mempunyai setiap peluang untuk mencabar tuduhan yang dibuat terhadapnya, dengan memeriksa balas saksi-saksi pendakwaan dan dengan mengemukakan keterangan daripada pihaknya dan juga melalui saksi-saksinya. Yang arif hakim dalam penghakiman majoriti telah menangani keterangan, hujahan dan setiap keputusan hakim perbicaraan telah diteliti, termasuk pembelaan dan penjelasan pemohon. Oleh itu, ujian pertama di bawah *Mohd Naim* telah dipenuhi dalam keadaan kes ini.

(4) Pandangan majoriti berpendapat bahawa "tarikh" membentuk satu unsur penting pertuduhan yang perlu dibuktikan oleh pihak pendakwaan. Penghakiman majoriti tidak pernah menyatakan bahawa tiada kesalahan kelakuan hubungan seks. Penghakiman majoriti menerima bahawa kejadian hubungan seks yang membentuk perkara pokok pertuduhan telah berlaku tetapi terdapat keraguan berkenaan bila ia berlaku. Terdapat lebih daripada keterangan memadai atas rekod untuk yang arif hakim membuat pemerhatian yang dibuatnya dalam bahagian perenggan yang dipersoalkan itu. Oleh itu, ujian kedua di bawah *Mohd Naim* juga dipenuhi.

(5) Untuk membuktikan bahawa pertuduhan melakukan persetubuhan yang bertentangan dengan aturan tabii di bawah s. 377A Kanun Keseksaan, pihak pendakwaan harus membuktikan (i) tertuduh telah melakukan persetubuhan dengan seseorang; (ii) bahawa persetubuhan adalah bertentangan dengan aturan tabii; (iii) tertuduh telah bertindak secara sukarela; dan (iv) terdapat penetrasi. Penghakiman majoriti Mahkamah Persekutuan memutuskan bahawa tambahan kepada unsur-unsur di atas termasuk unsur "tarikh." Jika salah satu daripada unsur pertuduhan tidak terbukti, pertuduhan gagal dibuktikan. Yang arif hakim dalam penghakiman majoriti telah merujuk kepada satu unsur pertuduhan. Tiada kekhilafan dengan dapatan tersebut. Hujahan telah dibuat mengenai unsur tersebut oleh kedua-dua pihak kepada rayuan dan ini telah memberi hak kepada yang arif hakim dalam memutuskan keputusan majoriti untuk memberi pendapat berkenaan unsur tersebut. Ujian ketiga di bawah *Mohd Naim* telah dengan itu dipenuhi.

(6) Yang arif hakim dalam membuat keputusan majoriti mempunyai hak untuk membuat kenyataan seperti dalam bahagian perenggan yang dipersoalkan menurut ujian-ujian yang terdapat dalam *Mohd Naim*. Selanjutnya, jika permohonan ini dibenarkan, ia mungkin boleh menyebabkan kebanjiran permohonan-permohonan sebegini untuk "mengubah" penghakiman mahkamah untuk disesuaikan dengan tujuan masing-masing oleh pihak-pihak yang tidak berpuas hati. Ini sama seperti campur tangan dengan proses penghakiman dan ini tidak patut dibenarkan.

Case(s) referred to:

Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***

Insas Berhad & Anor v. Ayer Molek Rubber Company Berhad & Ors [1995] 3 CLJ 328 FC ***(dist)***

Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 4 CLJ 725 FC ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***

Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai and Ors AIR 1941 FC 1 ***(refd)***

State of Uttar Pradesh v. Mohd Naim AIR 1964 SC 703 ***(dist)***

Taylor & Anor v. Lawrence & Anor [2002] 2 All ER 353 ***(refd)***

Legislation referred to:

Penal Code, ss. 377A, 377B

Rules of the Federal Court 1995, r. 137

For the applicant - Sulaiman Abdullah (Leela Jesuthasan, Latheefa Koya, Mohd Radzlan Jalaludin & Afiq M Nor with him); M/s Abu Bakar & Yong

For the respondent - Manoj Kurup; DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

Introduction

[1] This is an application by the applicant under r. 137, Rules of the Federal Court 1995 ("RFC") for this court to exercise its inherent powers to expunge part of one paragraph of the

judgment of his Lordship Abdul Hamid Mohamad, FCJ (as he then was) in Federal Court Criminal Appeal No. 05-6-2003(W) and No. 05-7-2003(W) dated 2 September 2004. The impugned part of the paragraph sought to be expunged states as follows:

> ... even though reading the appeal record, we find evidence to confirm that the appellants were involved in homosexual activities and we were more inclined to believe that the alleged incident at Tivoli Villa did happen, sometime, this court, as a court of law, may only convict the appellants if the prosecution has successfully proved the alleged offences as stated in the charges, beyond reasonable doubt, on admissible evidence and in accordance with established principles of law. We may be convinced in our minds of the guilt or innocence of the appellants but our decision must only be based on the evidence adduced and nothing else ...

[2] The impugned part of the paragraph sought to be expunged is in the majority decision of the Federal Court delivered more than nine years ago in allowing the applicant's appeal against his conviction and sentence for an offence of committing carnal intercourse against the order of nature, an offence under s. 377A punishable under s. 377B of the Penal Code.

Contention Of The Applicant

[3] The applicant contended that the impugned part of the paragraph had grossly tarnished his reputation and continuously caused serious injustice and damaged his reputation as it had been constantly misused and abused, repeated and widely published as a justification to condemn him as a homosexual or sexual deviant to the public. The applicant was of the view that part of the majority judgment was the personal remark of the learned judge which was not the basis, *ratio decidendi* nor the *obiter dictum* of the majority judgment.

[4] The applicant further alleged such a remark was unfair and unreasonable which did not take into account the applicant's evidence in his defence during the trial. According to the applicant there was no evidential basis that justified the making of that remark.

[5] Learned counsel for the applicant submitted that this court has the inherent powers to make any order for the purpose of securing the ends of justice. These powers extend to expunction or ordering expunction of irrelevant remarks made against a person

whether or not they were parties to the proceedings. In support of this proposition, learned counsel referred to us the case of *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 wherein Zaki Tun Azmi, PCA (as he then was), cited with approval *Halsbury's Laws of England*, 4th edn. vol. 37 paras. 12 on the issue of "inherent jurisdiction" at para. 37 as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[6] On the law and the authority relating to expunction of remarks in a written judgment learned counsel for the applicant cited the case of *State of Uttar Pradesh v. Mohd Naim* 1964 AIR SC 703 ("*Mohd Naim*") in which the Supreme Court of India had ordered the expunction of uncalled for remarks made by Mulla J of the Allahabad High Court against the Indian Police Force. In ordering the expunction of the remarks, the Supreme Court observed:

> If there is one principle of cardinal importance in the administration of justice, it is this: the proper freedom and independence of judges and magistrates must be maintained and they must be allowed to perform their functions freely and fearlessly and without undue interference by anybody, even by this court. At the same time it is equally necessary that in expressing their opinions, judges and magistrates must be guided by consideration of justice, fair play and restraint. It is not infrequent that sweeping generalizations defeat the very purpose for which they are made. It has been judicially recognized that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider: *(a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on conduct.* It has also been recognized that judicial pronouncements must be judicial in nature, and should not normally depart from sobriety, moderation and reserve.

> **The learned Judge referred to no material on which this observation was based**, nor did he say that his experience of criminal trials gave him an occasion to compare the records of crime of various lawless groups in the State *vis-à-vis* the Police Force. To characterize the whole Police Force of the State as a lawless group is bad enough; to say that its record of crime is the highest in the State is worse and coming as it does from a Judge of the High Court, is sure to bring the whole administration of law and order into disrepute. *For a sweeping generalization of such a nature, there must be a sure foundation and the necessity of the case must demand it. We can find neither in the present case.* (emphasis added)

[7] It was also submitted for the applicant that our courts had on various occasion expunged remarks made in a judgment. In the case of *Insas Berhad & Anor v. Ayer Molek Rubber Company Berhad & Ors* [1995] 3 CLJ 328; [1995] 2 MLJ 833 ("*Insas Bhd*") His Lordship Eusoff Chin CJ in the Federal Court held that:

> The objectionable and wholly offensive remarks made against a court of law, the plaintiffs and their solicitors, and the learned High Court Judge, all of whom had had no opportunity to defend themselves in the face of such unwarranted and unjustified criticisms, ought to be expunged from the judgment of the Court of Appeal, as it has a tendency to bring the whole administration of law and order in the courts into disrepute. It is judicially recognized that judicial pronouncements should be judicial in nature and not depart from sobriety, moderation, and reserve. It has been said elsewhere that the pen of a judge should be like the knife of a surgeon which probes into the flesh only as much as is absolutely necessary for the purpose of the case before it. A judge should neither reward virtue nor chastise vice, and his judgment should not display emotion and intemperance as displayed in the judgment of the Court of Appeal here.

[8] In another local case of *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (Interveners)* [2007] 4 CLJ 725; [2007] 5 MLJ 501, His Lordship Richard Malanjum CJ (Sabah & Sarawak) in the Federal Court at paras. 79 and 82 of the judgment held that:

> [79] Having carefully examined the relevance and the context in which the remarks and findings were made particularly in the main judgment of the Court of Appeal we are of the view that they were unnecessary and irrelevant in determining the issues and claims before the court. It is indeed regrettable that those remarks made were not only unnecessary but that the language used was unwarranted to say the least.

A [82] But as those cases show such criticisms or remarks are not without limit. They 'will carry no weight for the appellate court provided the criticisms were based on material properly before the judge in that case and were not, in the light of that material inappropriate'. Hence, in our view what is expected from an
B adjudicating tribunal is to consider only the evidence adduced to determine if the claims have any merits.

Decision Of This Court

[9] We would like to state at the outset that we are mindful of
C the fact that our discretionary powers under r. 137 of RFC should not be exercised liberally but sparingly, in very exceptional cases where a significant injustice had probably occurred. In *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* (*supra*) Abdul Hamid Mohamad CJ listed some of
D the instances where the inherent jurisdiction of this court may be exercised. These are as follows:

(a) Where there is a lack of quorum as in *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61; [2001] 4 MLJ 1
E where two of the presiding judges had retired at the same time when the judgment was delivered and only one judge remaining who was capable of exercising his function as a judge of that court;

(b) Where the decision has been obtained by fraud or suppression
F of material evidence as in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577; [2002] 2 MLJ 673;

(c) Where there is a clear infringement of statutory law eg, where the court has mistakenly applied a repealed law. But where it
G is a matter of interpretation or application of the law, it is not a suitable case for review;

(d) Where the application for review has not been heard by the court but, through no fault of the applicant, an order was
H inadvertently made as if he has been heard as in *Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai and Ors* AIR [1941] FC 1; and

(e) Where bias has been established as in *Taylor & Anor v. Lawrence & Anor* [2002] 2 All ER 353.

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[10] Having considered the arguments advanced by learned counsel for the applicant and the reply by learned Deputy Public Prosecutor, it is our considered view this is not a fit and proper case for this court to exercise its inherent powers under r. 137 RFC to make an order for the impugned part of the paragraph to be expunged for the following reasons.

[11] It is noted that both the applicant and the Deputy Public Prosecutor relied on the three considerations or tests propounded in the case of *Mohd Naim* in support of their respective arguments namely:

(a) Whether the party whose conduct was the subject of remark was before the court and had the opportunity of explaining or defending himself;

(b) Whether there is evidence on record bearing on that conduct justifying the remarks; and

(c) Whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on conduct.

[12] Based on the above three considerations or tests propounded in the case of *Mohd Naim* and applying them in the context of the present case we agree with the submissions of learned Deputy Public Prosecutor that the three tests had been satisfied justifying the learned judge to make the remarks which the learned judge did in the impugned paragraph.

[13] We are of the view that both, *Mohd Naim* and *Insas Bhd*, relied by the applicant to support his case can be distinguished on the facts from the present case. In *Mohd Naim* and *Insas Bhd*, comments and opinions deemed disparaging were directed at entities who were not parties to the proceedings and who had no opportunity to explain or defend themselves against those comments. In addition, those comments and opinions were not necessary for the decision of the case. Thus, in both cases, the offending parts of the judgments were expunged. The situation in the present application is entirely different. The applicant was a party to the proceedings as an appellant. There was sufficient evidence on record to justify the comment which the learned judge did. We agree with submissions of learned Deputy Public Prosecutor that the comment was part and parcel of the analytical process undertaken by the learned judge in arriving at the decision which the majority judgment did.

[14] We observe that the impugned paragraph commenced with the words "… even though reading the appeal record ... " were followed by these critical words, "we find evidence …" In our view the conclusion arrived at by the majority judgment in the impugned paragraph was in fact based on evidence found in the appeal record. It therefore cannot be termed a "personal opinion" of the learned judge who delivered the majority decision. The appeal record contained the full transcript of what transpired at the trial. Indeed the learned judge alluded to the completeness of the record as follows:

> We must record our appreciation for the meticulous recording of the notes of evidence by the learned trial Judge, without which we would not be able to scrutinize the evidence, the submissions and the grounds for every ruling and decision that he had made in the preparation of this judgment.

[15] We also note that the applicant had testified on his own behalf during the trial before the High Court and in addition had called several witnesses to testify for the defence. The applicant had every opportunity of challenging the accusations made against him, both, by cross-examining the prosecution witnesses, by adducing evidence on his own behalf as well as through his own witnesses. The learned judge of the Federal Court in the majority judgment dealt with the evidence, the submissions and every ruling of the trial judge were scrutinised, and it follows, including the applicant's defence or explanation. It is our judgment that the first test under *Mohd Naim* had been satisfied in the circumstances of this case.

[16] With regard the second test under *Mohd Naim* it may be appropriate to identify the *ratio decidendi* of the decision of this court given on 2 September 2004 in allowing the applicant's appeal. Upon analysis of the majority judgment, it is clear that the majority decision was based almost wholly on the fact that the date of the offence had not been proven. The majority view was of the opinion that the "date" formed an essential ingredient of the charge that had to be proved by the prosecution. The majority decision was of the view that even if the evidence of the complainant were corroborated, that would not prove the "date" of the offence. The majority was of the opinion that since no other date was proved through the complainant, the prosecution had to prove the date as in the charge. This is what the learned judge stated:

> In the instant appeals, it is not that the offences have been proved to have been committed on another day, not being the date stated in the charge. The question of amending the charges does not arise. It is simply a question whether the alleged offences have to be proved to have been committed as per charge, including the date.

[17] It is noted that at no time did the majority judgment hold that the sexual offence did not occur. Several passages in the written judgment in dealing with evidence of the complainant amongst others are reproduced herein as follows:

> (1) We accept that he may not be lying. He may be confused. May be he cannot remember because the incident happened many years earlier and unlike in most sexual cases, he did not lodge a police report immediately.
>
> (2) We do not go so far as to say that Azizan's evidence is 'uninspiring and unacceptable' or that all his evidence is not credible. All that we say is that some parts of this evidence are rather doubtful or are inconsistent. So, we would still look for corroborative evidence.
>
> (3) No doubt Azizan has been consistent in admitting the incident at Tivoli Villa despite the shame that would have been caused to him by such admission though made years later, but we are doubtful as to when it happened and his purported role as the innocent victim therein.

[18] In highlighting the above passages, we are of the view that the majority judgment accepted that the sexual incident forming the crux of the charge did in fact occur but were doubtful as to when it in fact took place. There was more than sufficient evidence on record for the learned judge to make the observation which he did in the impugned part of the paragraph. It must be stated here that there was a dissenting judgment which had dismissed the appeals. We are therefore of the view that the second test under *Mohd Naim* has also been satisfied.

[19] On the third test as to whether it was necessary for the decision of the case to include the impugned part of the paragraph as an integral part of the majority judgment, we have to address the charge framed against the applicant. In order to prove the charge of committing carnal intercourse against the order of nature under s. 377A of the Penal Code, the prosecution had to establish the following ingredients:

A (i) that the accused had carnal intercourse with a person;

(ii) that such intercourse was against the order of nature;

(iii) that the accused did the act voluntarily;

B (iv) that there was penetration.

[20] The majority judgment of the Federal Court held that in addition to the above ingredients included the ingredient of "date". The applicant was convicted before the trial judge and his appeal C against that decision was dismissed by the Court of Appeal. His appeal to this court in 2004 was against that finding that he committed carnal intercourse against the order of nature; that was an ingredient held proved by the trial and intermediate appellate court.

D **[21]** It is settled law that should one of the ingredients of the charge remains unproved, then the charge is not made out. The learned judge in the majority judgment was referring to an ingredient of the charge. We are of the view that there was E nothing wrong with that finding. In the extensive analytical process carried out by the learned judge, he mentioned one ingredient of the charge. Submissions were made on that ingredient by both parties to the appeal and that surely entitled the learned judge in delivering the majority decision to comment on that ingredient. We F are of the view the third test under *Mohd Naim* has also been satisfied.

[22] It is our judgment that the learned judge in delivering the majority decision was perfectly entitled to make the remark as in the impugned part of the paragraph in accordance with the test G propounded in *Mohd Naim*. We are in agreement with the submissions of learned Deputy Public Prosecutor that should this application be allowed, it may open a floodgate for dissatisfied parties to make similar applications to "edit" judgments of the courts to suit their respective purposes. In our considered view H this would tantamount to interfering with the judicial process which should not be allowed.

[23] For the reasons abovestated we dismiss this application.

I